United States District Court

For the Northern District of California

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8   IN THE UNITED STATES DISTRICT COURT

9   FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11   RICHARD SNYDER,   No   C-03-4992 VRW

12   Plaintiff,   ORDER

13   v

14   DEPARTMENT OF DEFENSE et al,

15   Defendant.
                                        /
16   _____

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18   By order dated February 2, 2005, the court reserved

19   decision on the parties' cross-motions for summary judgment

20   regarding the propriety of a fee that was charged to plaintiff in

21   connection with his request under the Freedom of Information Act

22   (FOIA). Doc #44. The court determined that such a challenge was

23   properly cognizable under the Administrative Procedure Act (APA), 5

24   USC § 706(2), and permitted the parties to file further motions for

25   summary judgment. Doc #44 at 14:14-27. The court further ordered

26   that all evidentiary material in support of such further motions be

27   filed anew. Id. The parties did file further motions (Doc ##45,

28   48) and supporting papers (Doc ##46, 49, 50, 58, 61). At the

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1   hearing on April 7, 2005, the court suggested that proceedings

2   would be expedited if the parties would stipulate to treating the

3   cross-motions for summary judgment as a bench trial on the papers

4   submitted (including the administrative record, Doc #8). The

5   parties agreed. Accordingly, the court makes the following

6   findings of fact and conclusions of law with respect to the so-

7   called CAGE Code fee (the "fee").

8   The court finds that plaintiff was charged a total of

9   $75.17. See, e g, Hill Decl (Doc #50) ¶4; Administrative Record

10 (AR) tab 10. This represents the sum of several component charges,

11 found at AR tab 8, which the court will address in turn:

12   1. $3.67 for 5 minutes of GS-12/10 analyst time at
13           $44/hour to "prepare and e-mail 522 to DISA"

14   2. $3.67 for 5 minutes of GS-12/10 analyst time at
             $44/hour to "enter customer and job information into
15   workload tracking database"

16   3a. $2.20 for 3 minutes of GS-12/10 analyst time at
             $44/hour to create/find a JCL program to transfer
17   the CAGE code file from tape to disk

18   3b. A charge for computer processor time to transfer the
             CAGE code file from tape to disk

19   4a. $1.47 for 2 minutes of GS-12/10 analyst time at
             $44/hour to create/find a program to compress the
20   CAGE code file

21   4b. A charge for computer processor time to compress the
             CAGE code file
22
        5a. $1.47 for 2 minutes of GS-12/10 analyst time at
23           $44/hour to create/find a program to FTP (transfer)
             the CAGE code file to plaintiff
24
        5b. A charge for computer processor time to transfer the
25   CAGE code file to plaintiff

26 The aggregate charge by defendants for computer time was for nine

27 minutes of CPU time (AR tab 10) for a cost of $62.70. (Due to

28 rounding, the sum of the above charges is actually $75.18.)

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1   The court first addresses the charges for analyst time.

2 The court finds that component (1) relates to internal

3 communications at defendants' offices regarding the processing of

4 plaintiff's request; "522" refers to the FOIA statute, 5 USC § 552.

5 FOIA provides that fee schedules, such as defendants have

6 promulgated, AR tab 2, "shall provide for the recovery of only the

7 direct costs of search, duplication, or review." The activities

8 described in component (1) are plainly neither "search" nor

9 "duplication." Although "[r]eview costs" include some preparatory

10 work, such as "initial examination of a document for the purposes

11 of determining whether the documents must be disclosed," the court

12 finds that the activity in component (1) is not "review" within the

13 meaning of FOIA. Accordingly, the court holds that defendants'

14 charging of plaintiff for component (1) is "not in accordance with

15 law," 5 USC § 706(2)(A).

16   Much the same analysis applies to component (2), which

17 the court finds relates to defendants' internal recordkeeping.

18 This is not properly chargeable to plaintiff under FOIA.

19 Accordingly, the court holds that defendants' charging of plaintiff

20 for component (2) is "not in accordance with law," 5 USC §

21 706(2)(A).

22   In contrast, components (3a), (4a) and (5a) are related

23 to "duplication." Plaintiff disputes the amount of time incurred

24 in each step and the rate charged, but the court finds these

25 accurately reflect defendants' costs. Accordingly, these charges

26 are proper.

27   Likewise, the fact that plaintiff was charged for the

28 corresponding computer time in components (3b), (4b) and (5b) is

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1   not improper. The court credits the declaration of Robert Porter,

2   one of defendants' employees. Porter Decl (Doc #61). For perhaps

3   the first time in this litigation, the parties have been able to

4   put before the court evidence from an individual with personal and

5   technical knowledge of the facts in issue in this case. It is for

6   this reason that the court credits Porter's declaration.

7   Plaintiff also disputes the amount of the charges for

8   components (3b), (4b) and (5b). The court finds that defendants

9   are correct in that "raw" processor time must be converted via a

10 "normalization factor" into "normalized" processor time, because

11 different processors run at different speeds. See, e g, AR tab 4.

12 As such, the court has no basis on which to set aside the per-

13 minute charges for processor use.

14   With respect to the amount of processor use, the court

15 acknowledges that various documents in the administrative record

16 suggest different total job times. Compare AR tab 4 (3:57 CPU min)

17 with AR tab 8 (1:48.25 CPU min total) with AR tab 10 (9 CPU min).

18 In particular, there is some suggestion that the 9 minute figure

19 (which was actually charged to plaintiff) represents running "the

20 job 2 times." AR tab 11. But plaintiff's challenge is confined to

21 (1) being charged at all for certain tasks and (2) the use of a

22 normalization factor. The court has rejected both of these

23 challenges, and, accordingly, the court holds that no computer

24 charges were inappropriate.

25   In sum, the court concludes that defendants' charge of a

26 total of 10 minutes of analyst time at $44/hour -- or $7.33 -- was

27 improper. All other charges were not arbitrary or capricious or

28 not in accordance with law.

1   Accordingly, the court hereby declares that plaintiff

2 owes defendants $67.84 for the processing of the CAGE code fee

3 request that is the subject of this litigation. The clerk is

4 directed to TERMINATE the cross-motions for summary judgment (Doc

5 ##45, 48).

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7   IT IS SO ORDERED.

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9   /s/

10   **VAUGHN R WALKER**

11   **United States District Chief Judge**

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